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No. 05-908

IN THE
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

* * * * *

I. The District Belittles the Harm Caused by Its Race Preference.

A. Harm to Students and Families

The District argues that "only about 10%" of entering 9th grade students were denied their chosen school in 2000, Resp. Br. 39, but that represents over 300 instances of discrimination. Each such student was denied a benefit made available by the government (attendance at her preferred school) solely because of membership in a racial group.

The District argues the plan imposes no "undue" harm because "no public school student is entitled to assignment at the school of his or her choice." Resp. Br. 45. But when government makes a benefit available (such as the opportunity to choose one's high school), it cannot deny that benefit to someone because of her membership in a racial class without infringing her right to equal protection. Pet. Br. 32-33; *see also Powers v. Ohio*, 499 U.S. 400, 409 (1991). In addition, Parents set out uncontradicted evidence of the harm caused to families by the denial of admission to the higher quality schools close to their homes. Pet. Br. 3-8; JA 270-71; ER 57-58, 346-51.

The District argues that the harm it inflicts is "limited," because "no student was stigmatized." Resp. Br. 46. But the Equal Protection Clause prohibits discrimination, not "stigma." One suffers race discrimination regardless of

whether a racial classification "stigmatizes" its victims. Pet. Br. 44; Pet. App. 206a-07a; *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("Psychological injury or benefit is irrelevant"). Moreover, because one of the plan's purposes is to ensure that nonwhite students have access to schools with a sufficient number of white students, Resp. Br. 33, 40, it reinforces the notion that there must be "something inferior" about nonwhites that prevents them from achieving on their own, *see Jenkins*, 515 U.S. at 122 (Thomas, J., concurring). Explaining the Board's determination that diversity was an important goal, the then vice-president testified: "Well, I think the history has been that minority-impacted schools have traditionally been less effective in the education of children than majority schools. And so the feeling is that in order to effectively educate minority children we must get them into schools that have a large percentage of majority." JA 216.

The District also argues that "no particular racial or ethnic group was disproportionately advantaged or disadvantaged" by the race preference. Resp. Br. 45, 47.[1] But the right to equal protection is an individual right. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). "The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*." *Powers*, 499 U.S. at 410.

B. Harm to the Republic

The District and its allies refuse to acknowledge the damage done to our republic when, apart from remedial measures, government classifies citizens by race. While the

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[1] Parents, whose members include whites and nonwhites, oppose discrimination regardless of disproportionality, but make this observation because of the question it raises about Judge Kozinski's approach at Pet. App. 64a-66a: how does one determine when burdens are sufficiently proportionate to dispense with strict scrutiny?

District chides Parents for not submitting testimony on this point, Resp. Br. 29, it is beyond dispute that "classifying children in groups of color" for purposes of allocating public resources "espous[es] the principle that race trumps the individual," Pet. App. at 100a, "encourages notions of racial inferiority," and "incites hostility." *id.* at 88a; *accord Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment); *Shaw v. Reno*, 509 U.S. 630, 657 (1993). Racial classifications "can be the most divisive of all policies, containing within [them] the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). When inflicted by schools, the damage is particularly troublesome. Pet. App. at 90a; *cf. W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).[2]

When courts – including this Court in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), and *Plessy v. Ferguson*, 163 U.S. 537 (1896) – stray from adherence to the principle that the Equal Protection Clause renders our Constitution color-blind, the consequences have been dire.[3]

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[2] *Barnette* also rejected the suggestion that courts should defer to the judgment of local school boards: "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S. at 640.

[3] The experience of other nations with allocation of benefits on the basis of race have been similarly problematic. *See generally* Thomas Sowell, *Affirmative Action Around the World* (2004). Nations whose affirmative action laws are discussed in the Brief *Amicus Curiae* of Interested Human Rights Clinics et al. do not have our Equal Protection Clause. While Briefs *Amici Curiae* of Sen. Edward M. Kennedy *et al.* and of Former U.S. Secretaries of Educ. *et al.* question the potential effect of this case on implementation of federal statutes such as the No Child Left Behind Act, racial balancing to remedy past discrimination would be unaffected, and surely it is possible to fund and promote programs to improve

See Brief *Amicus Curiae* of Project on Fair Representation et al. at 5-15. In *Plessy*, only Justice Harlan foresaw that reading the Equal Protection Clause to allow state-sanctioned race discrimination would "have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned." 163 U.S. at 561 (Harlan, J., dissenting). Justice Harlan was right.

II. This Case Is Not About Integration.

It is "a perfectly understandable rhetorical ploy" for the District to pretend that this is a school desegregation case. Pet. App. 73a. The District calls the race preference "an integration tie-breaker" and refers often to "segregation" and "desegregation" and to "integration" and its benefits, as do nearly all of the *amicus* briefs supporting the District.[4] The District alleges that "housing patterns in Seattle are starkly divided along a north-south line," and that "[t]hese conditions have resulted in varying levels of racial

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educational opportunities for disadvantaged or underperforming students without allocating resources on the basis of race.

[4] These include the Brief of Hon. Clifford L. Alexander et al. regarding the U.S. military, and the Brief of Human Rights Advocacy Groups et al. regarding international treaties. (Moreover, the Solicitor General speaks for the Department of Defense, and U.S. obligations under treaties are subject to the Constitution. *Boos v. Barry*, 485 U.S. 312, 324 (1988)). Of the many *amici* supporting the District, only one considers current data on Seattle neighborhoods, Brief *Amicus Curiae* of Asian American Justice Ctr. et al. citing at 21 an unpublished thesis employing a disputed methodology. *See* Abigail & Stephan Thernstrom, *No Excuses* 174-79 (2003) (comparing Index of Exposure and Imbalance Index). And only one ally of the District looks at current enrollment data. In the Brief *Amicus Curiae* of Alliance for Education et al. some current enrollment data are mentioned at 23-24 in arguing the need for race preferences to prevent "resegregation" and "racial isolation," which the brief seems to equate but nowhere defines; the same data in more detail are displayed and evaluated *infra* pp. 6-8.

segregation in Seattle schools." Resp. Br. 1-2.[5] The record demonstrates, however, that Seattle's neighborhoods and high schools are integrated and diverse.

A. Seattle Neighborhoods Are Diverse.

As acknowledged by the District's superintendent and confirmed by District and census data, Seattle's neighborhoods are integrated and "rapidly" becoming even more diverse. Pet. Br. 15; JA 44, 228-34. Although the District alleges a "stark" north-south racial division within the city, the numbers cited in support show that nonwhite students comprise more than 35% of public school students living north of the ship canal – the alleged dividing line between the white north and the nonwhite south – while whites comprise 22% of all students living south of the canal.

Both census data and the District's own figures thus reflect significant racial diversity among Seattle neighborhoods even before taking into account the significant diversity existing among different groups of nonwhites. Consequently, if today every Seattle child attended the school closest to home – a policy no one advocates – the school system would still not be "segregated." Pet. Br. 30-31.

B. Under Open Choice, Seattle High Schools Are Diverse Without Use of a Race Preference.

This case is not about residential patterns; it is about high school enrollments. Because of Seattle's open choice plan every child may attend whatever school she chooses

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[5] The District says the lower courts "concluded" that "assigning students to schools close to their homes would result in '*de facto* segregated' schools." Resp. Br. 31-32. But there are no findings of fact in this case, an appeal from a summary judgment, and the Washington Supreme Court merely answered a certified question. This Court therefore reviews the record *de novo*. The only finding on which the District can try to rely was made in 1979 in *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1001 (W.D. Wash. 1979) – hardly evidence of the facts today.

unless it is oversubscribed. In result, Seattle high schools are integrated and more diverse than city neighborhoods.

In 2000-2001, if race had not been used in assignments, enrollment would have been as follows:

	Asian American	African American	Latino	White	Native American
Ballard	14.7%	8.9%	9.6%	62.6%	4.3%
Cleveland	43.0%	35.0%	10.0%	10.0%	2.0%
Franklin	39.3%	34.6%	5.5%	19.8%	0.8%
Garfield	12.5%	34.7%	4.4%	47.2%	1.1%
Hale	17.4%	12.1%	6.4%	60.8%	3.3%
Ingraham	38.0%	19.0%	9.0%	30.0%	4.0%
Rainier Beach	30.0%	52.0%	8.0%	8.0%	2.0%
Roosevelt	26.8%	6.7%	8.7%	54.8%	3.0%
Sealth	27.0%	18.0%	21.0%	32.0%	3.0%
West Seattle	26.0%	15.0%	10.0%	46.0%	2.0%

Pet. Br. 13-14; JA 308-09. Substantial white/nonwhite diversity will be noted at the four oversubscribed schools to which the race preference applied (identified in bold). There was similar diversity at the undersubscribed schools except Cleveland and Rainier Beach, where the race preference did not apply. Moreover, in all schools there was a rich diversity among nonwhite groups. In its bizarre definition of "diversity," the District completely ignores differences among nonwhite groups. For example, under the District's definition a school would be considered racially imbalanced and insufficiently diverse if the student population were equally divided among Asian Americans, African Americans, Latinos, and whites.[6] This

[6] White enrollment in the District is 40.1%, JA 37, so to avoid operation of the race preference a school had to be at least 30.1% (in 2000-2001) or 25.1% (after 2001) white.

defies both common sense and the opinion of the District's expert, who said it was important to consider the racial make up of the nonwhite group when trying to achieve the proffered benefits of diversity. Pet. Br. 17; JA 276-79; ER 325-26, 654.

Enrollment in the years since use of the race preference was enjoined shows that high schools in Seattle are naturally diverse without any race preference. According to the annual reports for each school,[7] enrollment in 2005-06 was as follows:

	Asian American	African American	Latino	White	Native American
Ballard	14.21%	9.01%	11.70%	62.33%	2.75%
Cleveland	23.86%	53.61%	11.34%	8.10%	3.09%
Franklin	48.92%	33.49%	6.60%	10.18%	0.81%
Garfield	20.06%	29.53%	6.08%	43.07%	1.25%
Hale	17.28%	10.75%	8.00%	61.49%	2.48%
Ingraham	34.40%	17.87%	9.40%	36.41%	1.93%
Rainier Beach	24.91%	60.57%	6.79%	6.60%	1.13%
Roosevelt	23.25%	9.04%	7.35%	58.73%	1.63%
Sealth	24.70%	25.14%	21.76%	24.59%	3.81%
West Seattle	22.03%	14.79%	14.02%	46.76%	2.39%

At the schools to which the tiebreaker applied in 2000, the changes have been very small. Ballard, the whitest school in 2000, has experienced a slight decrease in white enrollment. At Roosevelt and Hale there were increases of 3.93 and 0.69 percentage points, respectively. The only significant change was decrease in white attendance at Franklin, from 19.8% to 10.18%, accompanied by a corresponding increase in Asian American students, and the

[7]Available at http://www.seattleschools.org/area/m_schools/index.dxml. Select "annual report" from individual school web page.

District's expert testified that looking only at the white/nonwhite composition in a Seattle school like Franklin, with a substantial Asian American enrollment, would be "misleading" because such schools have "that majority context feel to it or performance characteristic to it." JA 277-78.

District data likewise refute the claim of a "stark" north-south racial divide. In the north-end high schools (Ballard, Hale, Ingraham, and Roosevelt), enrollment is 55% white and 45% nonwhite; in schools south of the canal, enrollment is 27% white and 73% nonwhite. That 45% of students *attending* north-end high schools are nonwhite, while nonwhites comprise 35% of all public school students *living* in the north end, indicates that many nonwhite students from south of the canal choose to and do attend north-end high schools. Seattle high schools thus remain widely diverse and suspension of the race preference has triggered no trend toward "resegregation."[8]

III. The Interest Furthered by the Race Preference Is Racial Balance, Which Cannot Be "Compelling."

Although the Brief for Respondents identifies three interests that the District claims to further by its use of the race preference, analysis reveals each of them to be but a

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[8] The District and its allies often forget that "[a]n integrated school system does not mean – and indeed could not mean in view of the residential patterns of most of our major metropolitan areas – that *every school* must in fact be an integrated unit." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 226 (1973) (Powell, J., concurring in part and dissenting in part). Nor does "integration" require racial balance. Thus, although Howard University School of Law "is a predominantly black institution," it "has always been and remains today wholly integrated." Br. *Amicus Curiae* of Civil Rights Clinic at Howard Univ. Sch. of Law at 1 n.2. And while the Brief *Amicus Curiae* of Nat'l Collegiate Athletic Ass'n is filed "to emphasize the enormous positive impact of integration" on student-athletes and viewers of college sports, *id.* at 3, it certainly does not argue that sports teams should be racially balanced.

different expression of one intent: a predetermined racial balance that the District deems beneficial.

First, the District claims to seek the "educational benefits of racially and ethnically diverse schools." Resp. Br. 24. However, the term "racial diversity" is used to mean a *particular* racial balance between whites and nonwhites. JA 214-16, 234-36, 255-57. Therefore, to seek the benefits of racial diversity is, for the District, to seek the benefits of its preferred white/nonwhite balance. The immediate interest furthered by the race preference is thus racial balance.[9]

Second, the District claims an interest in "reducing racial isolation and providing the opportunity to opt out of *de facto* segregated schools." Resp. Br. 30. But in depositions, District officials were unable to define this term. JA 225-27, 257; *see also* Pl.'s Mem. Opposing Def.'s Mot. for Partial Summ. J. (W.D. Wash., Mar. 5, 2001) at 3 n.4. What the District actually means by "racial isolation" appears from its statement that, because Rainier Beach and Cleveland High Schools are 90% nonwhite, "[s]tudents attending those schools clearly attended racially isolated or *de facto* segregated schools." Resp. Br. 32. Since those schools had large percentages of both Asian Americans and African Americans, and significant percentages of Latinos, *supra* pp. 6-7, what the District means by "racially isolated" is that a school has too few white students. So for the District, "racial isolation" is merely the absence of its preferred racial balance. JA 225-26, 257; ER 386-87.

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[9] Racial diversity is not a compelling interest anyway. The reasons why, *see* Pet. Br. 34-36, have not been refuted by the District. Although several *amici* supporting the District argue for the educational benefits of racial diversity, purportedly on the basis of social science, the evidence of such benefits and the validity of such studies is hotly disputed among social scientists. *See* Briefs *Amici Curiae* of Drs. Murphy et al. and David J. Armor et al.; *see generally*, Thernstrom, *supra* note 4; Dec. of Korrell, Ex. 10A (Dep. of Armor) (W.D. Wash., Mar. 8, 2001).

These first two goals were articulated (as three goals) in earlier proceedings (*see, e.g.*, Appellees' Cir. Ct. Br. 42 (Sept. 10, 2001)). The District has now added another, carefully crafted goal: to provide all students with equitable access to their schools of choice. Resp. Br. 33. For the District this actually means "to provide ***non-white*** students in south Seattle with equitable access to the most popular schools, which they would otherwise have been precluded from attending based on distance." Resp. Br. 33 (emphasis added). This refined articulation of the District's goal is simply an interest in racial balancing, i.e., in granting students of one racial group (nonwhites) a preference to attend particular schools (the three popular schools that are predominantly white) where their enrollment would move the school toward the District's preferred balance.

The District's interest in nonremedial racial balance cannot be a compelling interest. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."). Nonremedial racial balancing was condemned implicitly by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and explicitly by this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *See* Pet. Br. 26, 28. The same condemnation continues in *Grutter*, which the District misreads, and in *Gratz v. Bollinger*, 539 U.S. 244 (2003), which the District virtually ignores.[10]

In *Grutter*, as in *Gratz*, the Court agreed with Justice Powell's opinion in *Bakke* that while student body diversity, properly understood, may be a compelling interest in

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[10] The District's citations to *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), and *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), are to *dicta*, in cases involving *de jure* segregation, which do not survive the adoption of strict scrutiny for all racial classifications.

university admissions, *Grutter*, 539 U.S. at 325, an admissions system that considers race must also consider other factors that contribute to diversity, must not operate as a quota, and must provide for individualized consideration (a "paramount" requirement). *Id.* at 336-37.

Neither *Grutter* nor *Gratz* directly authorizes the District's race preference: the Seattle School District is not a university, it seeks only white/nonwhite diversity, and it conducts no individualized review of how an applicant might otherwise contribute to diversity. Undaunted, the District argues that, because "context matters," this Court meant to hold open the door to race preferences in public schools.

The District misreads the rationale in *Grutter* and the nature of the diversity interest approved in that case and in *Bakke*. The *Grutter* Court relied on Justice Powell's rationale for concluding that diversity of a particular kind could be a compelling interest in *university* admissions, viz., the university's First Amendment right of academic freedom, which includes the right to select whom to admit to study. *Grutter*, 539 U.S. at 324. But such a right has never been recognized for public secondary schools, nor should it be in light of the political pressures to which elected school boards are subject, especially on racial matters. *See* Pet. Br. 47-49.[11]

Moreover, Justice Powell in *Bakke* and the Court in *Grutter* expressly refused to accept mere racial diversity as a compelling interest. *Bakke*, 438 U.S. at 315 (Powell, J., concurring); *Grutter*, 539 U.S. at 334. Both insisted on a quest for *genuine* diversity in which race is only one among many "plus" factors to be weighed. *Bakke*, 438 U.S. at 317 (Powell, J., concurring); *Grutter*, 539 U.S. at 334. Pursuit of

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[11] For further illustration of such pressures in Seattle, see Brief *Amicus Curiae* of Competitive Enterprise Institute at 2 quoting excerpts from the District's website, which until June 2006 defined "racism" to include "emphasizing individualism," "having a future time orientation," and "defining one form of English as standard."

that kind of "genuine" diversity, implemented properly, comports with the constitutional duty of government to treat people as individuals, not components of racial groups. Not so the District's crude racial balancing.

Grutter and *Gratz* thus reaffirm that an admissions process dependent on nonremedial racial balancing fails *ipso facto* the narrow tailoring prong of strict scrutiny.[12] It follows that racial balance cannot itself be a compelling interest for a government school, even in the guise of diversity. For if it could be, then the Court's prohibition of racial balancing would be circumvented by redefining a ***prohibited*** means to be itself a ***compelling*** governmental interest. That is not what the Court intended in declaring that racial balancing is "patently unconstitutional." *Grutter*, 539 U.S. at 330.

IV. The District Cannot Prove That Its Race Preference Is Narrowly Tailored.

The District bears the burden of proving that its race preference satisfies the narrow tailoring prong of strict scrutiny. Pet. Br. 24. Parents' opening brief and Judge Bea's dissenting opinion below have already rebutted arguments advanced by the District on several important narrow tailoring issues such as whether the race preference is a quota, whether it imposes "undue" harm, and on the extent to which the judgments of school officials are entitled to deference *Supra* pp. 1-4; Pet. Br. 34-50; Pet. App. 22a-24a. A few narrow tailoring issues warrant further rebuttal.

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[12] As Parents recognize, it is lawful to employ racial balancing to the extent necessary to integrate a segregated school system. Pet. Br. at 25. The District fails to appreciate that even this form of race discrimination would be unlawful but for its necessity as a remedy. Resp. Br. 19-21.

A. Race-Based Admissions Are Not Necessary to Achieve Racial Diversity in Seattle High Schools, and the District Did Not Earnestly Consider Race-Neutral Alternatives.

The District "determined" that race-neutral alternatives would not be effective to accomplish its particular goals. Resp. Br. 38. The record shows, however, that the race preference is *not* necessary to achieve the District's goals, except the goal of a particular white/nonwhite balance, and that the District failed to earnestly consider race-neutral alternatives. Pet. Br. 39-43.

The District complains that Parents' narrow tailoring arguments ignore its actual interests, Resp. Br. 39-40, but the articulation of its goals has evolved during this litigation. At the court of appeals, the District's goals were described as (1) "voluntary integration of schools which ... would otherwise tend to become racially isolated; (2) ensuring that students, who would otherwise attend racially concentrated schools, have the opportunity to attend a more diverse school, and (3) the educational benefits of attending a racially and ethnically diverse school." Appellees Circuit Ct. Br. 42; *see also* JA 224-25; ER 540. However, *those* goals can be accomplished without use of a race preference and without changing any other aspect of the assignment plan: substantial diversity in the schools would remain, and students living near the two schools with the smallest white enrollment would be guaranteed admission to three "racially balanced" schools. Pet. Br. 39-41.[13]

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[13] To the extent students attend Cleveland or Rainier Beach instead of whiter schools, they do so voluntarily, much like the families who decide to attend the District's 99% nonwhite African American Academy middle school (apparently without causing any concerns about the lack of diversity in that school). http://www.seattleschools.org/area/siso/reports/anrep/altern/938.pdf; JA 227.

To these goals the District now adds another articulation of its interest: providing "non-white students" living near racially concentrated schools the "opportunity to attend a racially and ethnically diverse, ***popular*** school" that "they otherwise [would] have been precluded from attending based on distance." Resp. Br. 33, 40 (emphasis added). This refined articulation of the District's goal expresses simply an interest in racial balancing. The District cannot avoid narrow tailoring's prohibition on racial balancing by asserting racial balance as the goal. *Supra*, pp. 8-12.

The record also shows that the District did not earnestly consider race-neutral alternatives. Pet. Br. 17-19. The District cites evidence of its rejection of "regional" plans, but even those were not race neutral, as they too would have used a race preference. SER 443.[14] The District cites the majority opinion below to show that it earnestly considered using socio-economic status as a preference, but the record does not support it. Pet. Br. 17-19. In the testimony cited by the District, the then-board president confirmed that she was unaware of any data or study and that she rejected the use of socio-economic status because she "deferred to [her] colleagues of color ... who insisted that it was skin tone that mattered ... not economic status, and using economic status might be insulting." SER 414. The record also shows the District rejected use of a lottery without earnest consideration. Although it had available data regarding the racial composition of the applicant pool for oversubscribed schools, the District did no study of what the effects of using a lottery would be. JA 199-200, 252-55.[15]

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[14] The District also cites SER 383, a statement from the ACLU that says nothing about consideration of any race-neutral assignment plan.

[15] The "whitest" schools in the District would have been between 38% and 45% nonwhite in 2000 (and they are between 38% and 42% now) using *proximity*. *Supra* pp. 6-7. A lottery would result in greater minority enrollment at these schools, as it would give students from farther away a better chance of admission.

The District's *post hoc* arguments about the shortcomings of alternatives cannot overcome the admissions by District officials that they gave no serious consideration to any plan that did not make race-based assignments. To avoid the force of these admissions, the District suggests that Parents mischaracterize the superintendent's testimony. Resp. Br. 38 n.31. Parents invite examination of that testimony and of his testimony confirming the District had no interest in race-neutral alternatives. JA 224-25. The District did not use race as a "last resort." *See Croson*, 488 U.S. at 519 (Kennedy, J., concurring). It never considered using anything else.

B. The District Does Not Consider Race as One Factor Among Many

Attempting to cloak its plan in *Grutter* garb, the District argues it considered race "as only one among many factors influencing the school assignment of any child." Resp. Br. 43. The District can make this remarkable assertion only by including as other "factors" that "influence" assignments a student's choice of school, whether a school was oversubscribed, and the fact that some students were admitted on the basis of sibling preference. *Id.* The District refuses to acknowledge that whenever race is considered, it is not just the "predominant feature" considered, it is the *sole determining factor* under the District's plan. A student denied admission because of the race preference is rejected solely because of her membership in a racial class; that is unconstitutional. *See Gratz*, 539 U.S. at 270-75; *Grutter*, 539 U.S. at 334-37.

C. The District Is Not Exempt From the Requirement of Individualized Consideration.

The District argues that, because its admissions decisions are not merit-based (overlooking the Ballard Biotech program), it need not provide individualized consideration. Resp. Br. 48-50. The District misunderstands

the reasons for this requirement. It is not imposed because a school chooses merit-based admissions; it is imposed as an essential protection against government's treating a person as a component of a racial class. *See Grutter*, 539 U.S. at 336-37; *accord Gratz*, 539 U.S. at 270-72. That it might be administratively burdensome to provide this protection is no excuse. *Gratz*, 539 U.S. at 275.

V. The Petitioner Has Standing.

The District claims Parents lack Article III standing, but "incorrectly conflate[s] ... [the] case law on initial standing to bring suit ... with [the] case law on post commencement mootness" and gets both issues wrong. *Friends of the Earth, Inc. v. Laidlaw Env. Servs.*, 528 U.S. 167, 174 (2000) (citation omitted). Standing requires a plaintiff to have a "'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (citations omitted); *accord Ass'n of Data Processing Serv. Orgs., Inc., v. Camp*, 397 U.S. 150, 151-52 (1970). To bring a claim for prospective relief, a plaintiff must allege "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Adarand*, 515 U.S. at 211; *accord Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). An association has standing to sue if its members could have brought the claims, the interests it seeks to protect are germane to its purpose, and members' individual participation is not essential to resolution of the claims. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Because the challenge to Parents' standing has been raised for the first time in this Court, the inquiry must be based on the complaint, construed in Parents' favor. *Pennell v. City of San Jose*, 485 U.S. 1, 6-7 (1988). Parents had

standing to file suit, as individual members had standing to seek injunctive and declaratory relief. The complaint alleges at ¶ 1 that Parents is an association of families whose children have been denied admission or who in the future "will likely be denied admission to the high schools of their choice because of their race." JA 29.

Parents have continued to satisfy the standing requirements at every stage of this litigation. The complaint also alleges that "[s]ome members of [Parents] with children in middle schools in the Seattle Public School system fear that their children will also be denied admission to the high schools of their choice *when they apply for those schools* in the future." JA 30 (emphasis added). These allegations state that members of Parents have suffered and are likely to suffer further injury as a result of the District's admissions policy. They also establish that members of Parents will have to compete for school assignments in a discriminatory system, JA 299-301, which by itself is a sufficient injury for standing purposes. *See, e.g., Gratz*, 539 U.S. at 262; *Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Croson* 488 U.S. at 493; *Adarand*, 515 U.S. at 211-12. The District's belated standing argument must therefore fail. *See, e.g., Pennell*, 485 U.S. at 6-7; *accord Assoc. Gen. Contractors*, 508 U.S. at 668-69; *Clements v. Fashing*, 457 U.S. 957, 962 (1982).

Further, in response to interrogatories Parents provided testimony sufficient to establish its standing to seek declaratory and injunctive relief then and now. Parents identified members with children entering 9th grade as well as younger children. JA 299-301. Parents testified that in addition to the actual and likely future harm to these specific families, parents with children who want to attend one of the popular high schools "*including [Parents] members not specifically identified herein* have been or *will be harmed* by the defendants' race balancing policy." *Id.* (emphasis added).

Parents also testified that the race preference has changed "the neighborhood-nature of their public schools, by breaking up the community that has developed among the students and parents in the schools, and by making it more difficult for them to meet, know, and participate in the education of their children with parents of other students in the school." JA 300-01. The District can point to no evidence to contradict this testimony.[16]

"In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Allen v. Wright*, 468 U.S. 737, 751-52 (1984); *accord Pennell*, 485 U.S. at 7. The allegations and evidence of direct, imminent, and redressable harm in this case are much more substantial than that in the cases relied on by the District (where the harm to the plaintiff, or the defendant's role in causing harm, or both, were extremely attenuated). Parents' allegations and evidence are similar to or more substantial than those in cases where the Court has found standing. *See, e.g.*, *Adarand*, 515 U.S. at 210-12; *Assoc. Gen. Contractors*, 508 U.S. at 667-69; *Pennell*, 485 U.S. at 6-8; *Singleton v. Wulff*, 428 U.S. 106 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Soc'y of Sisters of the Holy Names*, 268 U.S. 510 (1925).

Because the complaint and the evidence demonstrate that Parents had and still have standing to assert claims for declaratory and injunctive relief, what the District really is arguing is that the case was rendered moot by its decision not

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[16] In addition, pursuant to Rule 32(3), Parents have requested permission to lodge an affidavit identifying additional members likely to be affected by any future use of the race preference. (A copy of the affidavit was included with the letter to the Clerk. *Cf. Pennell*, 485 U.S. at 8.) The affidavit confirms that families continue to join Parents as their children approach high school age and that member families will likely be affected "when applying for high school admission."

to reinstate the race preference after the court below vacated its injunction. *See, e.g.*, Resp. Br. 16–17; Cert. Opp. 21. But a defendant's voluntary cessation of illegal activity does not deprive the Court of jurisdiction unless it is "*absolutely clear* that the ... behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (emphasis added); *accord Friends of the Earth*, 528 U.S. at 189-90; *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The District's website still describes the race preference as part of the admissions plan and notes that it has only been "suspended" while this case is pending. Pet. App. 143a; http://www.seattleschools.org/area/eso/secondaryenrollmentguide20062007.pdf. In argument below, the District denied the case was moot and suggested that it would not be defending the policy if it did not want to be able to use it. Pet. App. 140a-43a.[17] Even now, the District merely speculates that future school directors might decide to abandon or modify the race preference. This "cannot suffice to satisfy the heavy burden of persuasion which [this Court has] held rests upon those in [Respondents'] shoes." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968); *cf. Lyons*, 461 U.S. at 101; *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987).

Finally, the District's mootness challenge also fails because even if the passage of time had mooted the claims at issue (and it has not), the illegal conduct by the District is capable of repetition yet evading review. Otherwise, by the District's theory, the window of time during which a claim would be sufficiently concrete and imminent but not moot would be only a matter of months, from the time a student receives her high school assignment through – at most – the

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[17] Because this representation was made to convince the Ninth Circuit to hold that the case was not moot, the District may not now argue otherwise. *See EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1049-50 (3d Cir. 1993); *cf. Pegram v. Herdich*, 530 U.S. 211, 227 n.8 (2000).

child's completion of her ninth grade year. The law of standing and mootness is not that rigid. *Roe*, 410 U.S. at 125; *cf. Singleton*, 428 U.S. at 117.

Because it is not absolutely clear that the District will not revive the race preference if allowed to do so, the Court should reject the suggestion that this case is moot. *See W.T. Grant Co.*, 345 U.S. at 632 ("The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.") (internal citation omitted).

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> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society.

Alexander Bickel, *The Morality of Consent* 133 (1975). The Court should reinforce that lesson by its decision in this case.

Respectfully submitted,

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